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## THE FEDERAL WATER POWER PROGRAM

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In view of the recent passage of important amendments in the law governing the Tennessee Valley Authority, and the prospects of an early Supreme Court decision on the constitutionality of its activities, some observations on the legal aspects of the Administration's water power program may not be untimely. This does not involve, except indirectly, the economic feasibility of government ownership, government competition, or the "yardstick" theory, nor their social implications, but is confined to a survey of the legislation on which the program is founded and the activities which form a part of it, undertaken from the standpoint of constitutional law. A full understanding of the subject, however, requires brief mention of the social and economic factors which underlie it.

The President consistently subscribes to the principle that water power is a natural resource which belongs to the people, and that its generation and distribution is a public trust, the administration of which requires federal control.<sup>1</sup> In its general aspect this belief is not seriously disputed. The controversy centers about the degree and method of control to be enforced, and the extent to which federal agencies can engage in the utility business in order to effect such control.

The avowed intentions of the Administration are to reduce rates and to increase consumption.<sup>2</sup> To this end, hydroelectric plants owned and operated by the federal government are being set up to establish a measure,

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1. President Roosevelt, speech at Bonneville, Oregon: "I don't believe that you can have enough power for a long time to come, and the power we are developing here is going to be power which for all times is going to be controlled by the Government." N. Y. Times, Aug. 4, 1934, at 3.

2. The President at Grand Coulee, Washington: ". . . we are going to see, I believe, with our own eyes, electricity and power made so cheap that they will become a standard article of use, not only for agriculture and manufacturing, but also for every home within reach of an electric-light line." N. Y. Times, Aug. 5, 1934, at 3.

advance on lines already marked out by existing law. This will appear from an analysis of the earlier acts.

The Federal Water Power Act is probably the most important statute in the group. Its full significance and possibilities do not seem to have been generally noticed. Various of its sections are amended by Title II of the Public Utilities Act of 1935, but the minor purposes and effects of the amendments clearly show that the framers of the original act were not far behind the present Administration in their conception of the part to be played by the federal government in the water power field.<sup>17</sup> The original act sets up the Federal Power Commission and invests it with jurisdiction over all navigable waters in and about the United States,<sup>18</sup> for the principal purposes (1) of making investigations and recording data "concerning the utilization of the water resources of any region to be developed," and (2) of licensing private concerns, states and municipalities to construct, operate and maintain dams, power-houses and similar projects as defined in the act, for periods not to exceed fifty years, such licenses, however, to be granted only after determination by the Commission that the particular project is well adapted to navigation improvement, water power development, and general public welfare in the region.<sup>19</sup> With a familiar ring the act lays emphasis throughout on conservation of the public interest, and specifically forbids combinations or agreements by licensees ". . . to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electric energy or service . . ." <sup>20</sup>

But in addition to licensing requirements and strict supervision of rates, output, *etc.*, the original act provides that the Commission may determine on investigation that a particular project should be constructed and maintained by the United States itself, and may then report such determination with recommendations to Congress.<sup>21</sup> That Congress is ready to act on similar recommendations is a matter of history today. The same act

17. The numbering of paragraphs is changed, a few definitions are added or altered, and the Commission is given increased administrative powers in the revocation of licenses and the determination of other factual issues affecting licensees. See Sections 5, 10 and 24, as amended. While the amending act necessarily sets forth at length the unchanged portions of the sections affected, the changes are relatively few. In addition to the above, a provision for adding penalties to delinquencies in the payment of annual charges (Section 17 as amended), and a provision expressly declaring unlawful the erection of unlicensed projects (Section 23 as amended), are included.

18. The definition of navigability, Section 3, expressly includes all navigable portions of a river, even though navigable only after the construction of the dam, as well as all falls and shallows which intervene between navigable parts, and also includes "such other parts of streams as shall have been authorized by Congress for improvement by the United States or recommended to Congress for such improvement after investigation under its authority."

As amended, Section 23 provides rather strangely that even though the stream is non-navigable, a person planning to build upon or across it for power or reservoir purposes shall notify the Commission, which in turn shall investigate the facts and ascertain whether or not it is navigable. The original act made such notification discretionary.

19. Section 4, 41 STAT. 1065 (1920), 16 U. S. C. A. § 797 (1927).

20. Section 10, 41 STAT. 1068 (h) (1920), 16 U. S. C. A. § 803 (h) (1927).

21. 41 STAT. 1067 (1920), 16 U. S. C. A. § 800 (1927).

and by the producers and manufacturers of gas, which undersells electricity in many essential services.<sup>9</sup> It is contended that the nation does not need and cannot use the new power which is made available by federal projects, present facilities being more than adequate for all reasonably anticipated needs.<sup>10</sup>

These extra-legal considerations are illustrative of the controversial appeal of the problem in many and varied quarters. And while constitutionality cannot theoretically be affected by proof of loss to millions of utility investors or by proof of gain to millions of electric power consumers, it is likely that the viewpoint of one or the other group will cast involuntary weight on the scales of judicial decision.

The legislation under which the Administration's water power program has taken shape consists chiefly of four acts:<sup>11</sup> (1) The Federal Water Power Act of 1920, and its amendment of 1935;<sup>12</sup> (2) The Boulder Canyon Project Act;<sup>13</sup> (3) The Muscle Shoals Act, as amended;<sup>14</sup> (4) The National Industrial Recovery Act (Title II).<sup>15</sup> The first two of these statutes were enacted during the Wilson and Coolidge administrations, respectively; only the last two are Roosevelt's. It follows that the present Administration cannot be credited with originating the view that development and conservation of hydroelectric power are within the scope of federal responsibility.<sup>16</sup> The present program is in some respects merely a bold

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ing the following: "An exclusively steam power generating system would with few exceptions prove a cheaper source of power than an exclusively water power system, but either used alone can not supply a market at as low a cost as an economical combination of the two sources of power." And Thomas A. Edison is quoted as having said in 1929: "The first and best source of power is coal."

9. See Address of H. O. Caster, President, American Gas Association, given at Atlantic City, N. J. N. Y. Times, Oct. 31, 1934, at 29.

10. See National Coal Association, *op. cit. supra* note 8, at 8.

11. In addition to the four acts named, mention should be made of the Work Relief Bill signed by the President on April 8, 1935, properly known as the "Emergency Relief Appropriation Act of 1935", P. R. No. 11, 74th Congress, 1st Sess. (1935), and of the Public Utility Act of 1935, P. L. No. 333, 74th Congress, 1st Sess. (1935). The former, so far as the water power program is concerned, merely supplements Title II of the National Industrial Recovery Act by making further appropriations available for P. W. A. loans and grants. The latter, of course, constitutes the enactment of the Administration's policy towards the private utility industry as a whole, having particular reference to holding companies. While it indirectly affects the water power program, the Wheeler-Rayburn bill cannot be said to be a part of it, except for Title II, which consists of amendments to the Federal Water Power Act, and is discussed more fully below. Accordingly, the validity of its other titles is not considered in this article. In another sense, the water power program, involving as it does federal competition with private utilities, can be regarded as an indirect attack on the industry, whereas the main sections of the Wheeler-Rayburn bill constitute a direct frontal attack.

12. 41 STAT. 1063 (1920), 16 U. S. C. A. § 791 (1927), amended by Title II of the Public Utility Act of 1935, P. L. No. 333, 74th Cong., 1st Sess. (1935).

13. 45 STAT. 1057 (1928), 43 U. S. C. A. § 617 (Supp. 1934).

14. 48 STAT. 58 (1933), 16 U. S. C. A. § 831 (Supp. 1934), also known as the Tennessee Valley Authority Act. Amendments to this act were signed by the President on August 31, 1935, P. L. No. 412, 74th Cong., 1st Sess. (1935).

15. 48 STAT. 200 (1933), 40 U. S. C. A. § 401 (Supp. 1934).

16. See U. S. Chamber of Commerce, *op. cit. supra* note 8, at 87-99, for comment on the development of federal control in this field.

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21. 41 STAT. 1067 (1920), 16 U. S. C. A. § 800 (1927).

further provides that, "Upon not less than two years notice in writing . . . the United States shall have the right upon or after the expiration of any license to take over and thereafter maintain and operate any project . . ." <sup>22</sup> Thus, the act contemplates not merely federal regulation, but also the possibility of federal ownership and operation of all the substantial sources of hydroelectric power. For fifteen years the Federal Power Commission has been vested with almost unlimited control of the production of that power, and the federal government has been authorized to supplant the private water power companies when and as their licenses expire.

Indications are that the present Administration intends to take full advantage of the Federal Water Power Act. The 1935 amendments are sufficient evidence to that effect. The Federal Power Commission will doubtless assume a more conspicuous place than heretofore. Only recently it has been responsible for a number of important reports which have furthered the Administration's policies in Congress and before the public generally.<sup>23</sup> Its licensing functions, of course, will continue, and its investigatory and research activities <sup>24</sup> may well be increased and developed to keep pace with the water power program as a whole, if not to guide the program's future course.

The Federal Water Power Act and the activities of the Commission have met frequent challenge in the courts and have always survived substantially unscathed.<sup>25</sup> In one case the following appears:

"It might be that, if Congress had adopted a plan for the sole purpose of damming up navigable streams in order to generate and sell water power, such an act would be in excess of the Constitution. The far-reaching effect of such federal policy would be a departure from that manifested by the act now under consideration. This enactment is for the improvement of the navigability of the stream. This is the paramount object. But an act which could be reduced to the isolated proposition that the federal government can dam up streams for the sole purpose of generating hydro-electricity and sell the same might be obnoxious to the organic law. I think it would be palpably in excess of the powers granted to Congress by the Constitution."<sup>26</sup>

Under such decisions federal regulation of the major water power projects is assured. Construction and operation thereof by the government is ap-

22. Section 14, 41 STAT. 1071 (1920), 16 U. S. C. A. § 807 (1927).

23. For instance, the much publicized memorandum submitted to the President on January 10, 1935, to show that the utility investments of savings banks and insurance companies are not endangered by the program.

24. The National Power Policy Committee, organized by the President, July 16, 1934, and the Mississippi Drainage Area Board, formed by the Secretary of the Interior, September 26, 1933 (Public Works Administration, Press Release No. 156), may be mentioned as sharing the function of the Federal Power Commission in this field.

25. See *Henry Ford v. Little Falls Fibre Co.*, 280 U. S. 369 (1930); *New Jersey v. Sargent*, 269 U. S. 328 (1935); *Alabama Power Co. v. Gulf Power Co.*, 283 Fed. 606 (M. D. Ala. 1922); *Appalachian Electric Power Co. v. Smith*, 4 F. Supp. 6 (W. D. Va. 1933).

26. *Alabama Power Co. v. Gulf Power Co.*, 283 Fed. 606, 613 (M. D. Ala. 1922).

proved only by *dictum* and within the uncertain limits of incidental activity.

The Boulder Canyon Project Act also contains features which serve conveniently as a part of the "New Deal" water power program. It was passed allegedly "for the purpose of controlling the floods, improving navigation, and regulating the flow of the Colorado River, providing for storage . . . and for the generation of electrical energy as a means of making the project herein a self-supporting and financially solvent undertaking . . .",<sup>27</sup> and provides that the Secretary of the Interior shall be "authorized . . . to contract . . . for . . . generation of electric energy and delivery at the switchboard to States . . . and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which . . . will in his judgment cover all expenses of operation and maintenance. . . ." <sup>28</sup>

This act, of course, has no general or national application. It deals with a specific local project to be constructed by the federal government and maintained for operation under federal supervision with careful regard to an equitable distribution of the benefits achieved. Seven states are directly affected, six of which have joined in a compact governing their rights in the development.<sup>29</sup> Upon final completion, the Boulder Dam project will have an annual capacity comparable to that of the Tennessee Valley development, and Boulder Dam itself, which is some 766 feet in height, is larger than any other dam so far contemplated in the water power program. The power plant will be leased to and operated by the city of Los Angeles and a private company, with estimated revenues sufficient to recover the investment in less than fifty years.

It is plainly the intent of the Administration to fit this vast project into the national program as an integral part. Since the act gives no extensive powers to the Department of Interior in respect to transmission and distribution of electricity and social betterment activities in the area affected, the project is hardly comparable to the Tennessee Valley Authority. Nevertheless, in a sense it does put the government in the power business,<sup>30</sup> and the judicial sanction which it carries renders it extremely valuable as an adjunct to the rest of the program. The act was sustained in its entirety as a lawful federal enterprise for the improvement of navigation, although

27. Section 1, 45 STAT. 1057 (1928), 43 U. S. C. A. § 617 (Supp. 1934).

28. Section 5, 45 STAT. 1060 (1928), 43 U. S. C. A. § 617 (d) (Supp. 1934).

29. The seventh state, Arizona, not only refused to join in the compact, but called out its militia to prevent the agents of the Department of the Interior from commencing construction of the new Parker Dam, a project auxiliary to Boulder Dam on the same river. In *United States v. Arizona*, 295 U. S. 174 (1935), the Court upheld Arizona, ruling that Congress had not authorized the auxiliary project. Such authorization is included in Section 2 of the so-called Rivers and Harbors Bill of 1935, P. L. No. 409, 74th Cong., 1st Sess. (1935).

30. The Report of the Natural Resources Production Department of the United States Chamber of Commerce, *supra* note 8, at 109, contains the following language: "Thus in the Boulder Canyon Project the federal government is definitely placed in the power business, takes the initiative and competes with private business as do municipalities. . . ."

there was much to indicate that power development was the primary purpose.<sup>31</sup> The Court simply stated: "As the river is navigable and the means which the act provides are not unrelated to the control of navigation, the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress."<sup>32</sup>

The Muscle Shoals Act of 1933 creates the Tennessee Valley Authority, which is authorized not only to build dams and produce power, but also "to distribute and sell the surplus power generated at Muscle Shoals . . . for the benefit of the people of the section as a whole, and particularly the domestic and rural consumers . . . in such manner as to encourage increased domestic and rural use of electricity."<sup>33</sup> Curiously enough, the declaration of legislative purpose does not mention hydroelectric power and merely provides:

" . . . for the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins, there is hereby created a body corporate by the name of the Tennessee Valley Authority."<sup>34</sup>

Here, as at Boulder Dam, the project is local, though vast. As on the Colorado, but to a greater degree, a broad development of the potentialities of the river basin is contemplated. In both projects the production of water power appears to be the primary purpose. The essential difference, typifying the new policies of the present Administration, lies in the fact that under the Muscle Shoals Act the government, through the Tennessee Valley Authority, will itself operate the generating plant, transmit and distribute the power, and concern itself generally with rates, consumption and economic progress throughout the area. Practically nothing is left for state compacts or for state control.

The Muscle Shoals project contemplates a system of at least four major dams, strategically located and inter-connected with government-built transmission lines, which will furnish cheap power throughout the area to municipal, industrial, domestic and rural consumers. And at the same time the Tennessee Valley Authority is authorized and expected to promote a general rehabilitation of the area, and a betterment of its standards of living, by applied sociology, vocational training, and other appropriate means to be studied and developed by government research.<sup>35</sup>

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31. See *Arizona v. California*, 283 U. S. 423 (1931).

32. *Id.* at 455.

33. Section II, 48 STAT. 64 (1933), 16 U. S. C. A. § 831 (j) (Supp. 1934).

34. Section I, 48 STAT. 58 (1933), 16 U. S. C. A. § 831 (Supp. 1934).

35. See A. E. Morgan, *Bench Marks in the Tennessee Valley* (Nov. 1934), 41 SURVEY GRAPHIC 548, and also Section 22 of the Act of 1933, 48 STAT. 69 (1933), 16 U. S. C. A. § 831 (u) (Supp. 1934).

The program, as actually launched by the Tennessee Valley Authority, is far-reaching and complete, taking advantage of the broadest implications of the language of the act. Some parts of it are not easily found among the powers expressly granted;<sup>36</sup> but the general scheme is there, and apparently it approaches as a model the New Deal water power program for the entire nation. For judicial sanction the Authority can properly point to the decision of the Circuit Court of Appeals of the Fifth Circuit,<sup>37</sup> overruling Judge Grubb of Tennessee and holding that the act is constitutional and that the activities of the Authority are within its lawful intent.

Even Tennessee Valley Authority, however, is not wholly a New Deal conception. Hoover and Coolidge both suggested and recommended using the proceeds of surplus Muscle Shoals power for local research and experimentation by the federal government.<sup>38</sup> The site of Wilson Dam was acquired by President Wilson under the National Defense Act<sup>39</sup> for the manufacture of munitions, and the hydroelectric power generated at the dam, in excess of the requirements for operating locks, lighting government buildings, *etc.*, was sold to the Alabama Power Company during most of the succeeding Republican administrations. In 1926 the United States Government used 3,318,000 kilowatt hours and sold 429,311,000 kilowatt hours, evidently without serious complaint from or injury to the private utility industry.<sup>40</sup> The Muscle Shoals Act is in one sense merely a disposal by Congress of a "white elephant" left by the war.<sup>41</sup>

The fourth important statute upon which the Administration's water power program is based is the National Industrial Recovery Act. Title II of that act sets up the Federal Emergency Administration of Public Works, commonly known as P. W. A., and authorizes the Administrator, under various circumstances and conditions, to construct, or make loans for the construction of, water power projects. It provides:

"The Administrator . . . shall prepare a comprehensive program of public works, which shall include among other things the following: . . . (b) conservation and development of natural resources, including control, . . . of waters, . . . development of water power,

36. The amendments adopted on August 31, 1935, would seem to cover many of the deficiencies alleged to exist in the original act. The powers of the Authority are defined and broadened along the lines discussed in the text (Sections 4j, 4k, 5c, 10, 12a and 26a, as amended or added), and its activities are placed more squarely on the ground of acknowledged constitutional powers (Sections 9a and 31 as added). See p. 13, *infra*.

37. Tennessee Valley Authority v Ashwander, 78 F. (2d) 578 (C. C. A. 5th, 1935). The opinion of the District Court is reported in 8 F. Supp. 893 (N. D. Ala. 1934).

38. U. S. Chamber of Commerce, *op. cit. supra* note 8, at 135.

39. 39 STAT. 215 (1916), 50 U. S. C. A. § 79 (1928).

40. See Alabama v. United States, 38 F. (2d) 897, 899 (Ct. Cl. 1930), *rev'd for lack of jurisdiction*, 282 U. S. 502 (1931).

41. See outline of legislative history of Muscle Shoals, prior proposals for its disposition, *etc.*, in U. S. Chamber of Commerce, *op. cit. supra* note 8, c. VIII.



transmission of electric energy, and construction of river and harbor improvements . . . ”; <sup>42</sup>

and further:

“With a view to increasing employment quickly, the President is authorized and empowered through the Administrator . . . (1) to construct . . . any public works project included in the program . . . (2) . . . to make grants to States, municipalities, or other public bodies for the construction of any such project . . . (3) to acquire . . . real or personal property in connection with the construction of any such project . . . ” <sup>43</sup>

At least seven major water power projects are under way with funds allotted by the Public Works Administrator under the powers delegated to him by this act.<sup>44</sup> The extent of these operations naturally gives rise to the complaint that the legislative branch is relinquishing its functions through improper delegation of powers.<sup>45</sup> Undoubtedly the Administration is using its general powers under Title II to extend federal activity on a nation-wide scale along lines similar to those specifically sanctioned by Congress in the Muscle Shoals Act. Accordingly, many Public Works Administration projects raise the same questions as to the propriety of federal activities and expenditures in the power field as are raised more directly by the Muscle Shoals Act and the enterprises conducted thereunder.

Equally important among the powers and duties of the Public Works Administration are those which relate to financing local public works projects by grants and loans to states and sub-state bodies. Many such projects, of course, have no relation to the water power program, as they involve other forms of public works expansion, but the activities of the Public Works Administration in co-operation with the Tennessee Valley Authority are directly in point, and indicate a basic and far-reaching policy. Not only have loans and grants been freely allotted to municipalities proposing to purchase T. V. A. power, but also, under the general provisions of the National Industrial Recovery Act, a corporation has been organized with the same officers as the Tennessee Valley Authority, for the purpose of promoting and financing the sale of electrical appliances in areas served with T. V. A. power.<sup>46</sup> Similar co-operation can be expected from P. W. A.

42. Section 202, 48 STAT. 201 (1933), 40 U. S. C. A. § 402 (Supp. 1934).

43. See Section 203, 48 STAT. 203, 40 U. S. C. A. § 403 (Supp. 1934).

44. Of these the most important are probably: Grand Coulee Dam, Columbia River, Washington; Bonneville Dam, Columbia River, Oregon; Fort Peck Dam, Missouri River, Montana; and Caspar-Alcova Dam on the North Platte River in Wyoming.

45. The subject of lawful and unlawful delegation of power to the Executive is not considered in this article. But it has, of course, already been made the ground of at least two Supreme Court decisions invalidating New Deal legislation, in which it was easily more apparent than in any of the legislation affecting the water power program. See *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935); *Schechter Poultry Corp. v. United States*, 55 Sup. Ct. 837 (1935).

46. Electric Home and Farm Authority was established by Proclamation of the President on December 19, 1933, and capitalized with P. W. A. funds. EXEC. ORDER No. 6514, Dec. 19, 1933.

in respect to other major hydroelectric projects, in the absence at least of an adverse Supreme Court ruling.

Neither in Title II of the N. I. R. A., nor in the Boulder Dam or Muscle Shoals statutes, is there any clear indication of the part to be played by the Federal Power Commission. The functions of the various bodies set up by these acts are clearly overlapping, and conceivably conflict might arise between the Federal Power Commission and the Public Works Administration or the Tennessee Valley Authority. While the Commission is given general control of water power projects on navigable streams, and may recommend federal construction and operation to Congress, it does not clearly have power to supervise or license government projects authorized by act of Congress, or by agencies created by acts of Congress other than the Water Power Act. Presumably, however, conflict will be avoided as long as the present Administration controls, and the various bodies will cooperate in the furtherance of the program as a whole. The Federal Power Commission itself is bound by Section 4 of the act<sup>47</sup> to submit to the War Department for approval any proposed construction which affects the navigability of a river.<sup>48</sup> It may be assumed that the Public Works Administration will approve no water power projects, especially for state, municipal or private construction, unless first passed on by the Power Commission.

This is a brief outline of the legislation affecting the government's water power policies. Of the four acts, two have long since been declared constitutional in decisions specifically covering the right of the federal government (1) to regulate private power companies operating on navigable streams;<sup>49</sup> and (2) to construct a dam on a navigable stream from which power will be generated and sold by the government or its lessees.<sup>50</sup> But this authority conclusively sustains only a small part of the program. Under the other two acts new and important constitutional questions arise on readily distinguishable facts.

The following are the principal water power activities of the federal government and its agencies under the Muscle Shoals Act and under Title II of the National Industrial Recovery Act: (a) Construction of dams, hydroelectric power plants, and transmission lines to be owned by the federal government and operated in competition with private concerns; (b)

47. 41 STAT. 1065 (1920), 16 U. S. C. A. 797 (1927).

48. Although the Federal Power Commission has jurisdiction over navigable bodies of water in general, its primary concern is water power. Navigability is the responsibility of the War Department to which all river, harbor and waterway improvements materially affecting navigability are referred. See, for instance, the Rivers and Harbors Bill of 1935. P. L. No. 409, 74th Cong., 1st Sess. (1935).

49. *Alabama Power Co. v. Gulf Power Co.*, 283 Fed. 606 (M. D. Ala. 1922); and see *Appalachian Electric Power Co. v. Smith*, 4 F. Supp. 6 (W. D. Va. 1933), which sustains federal control even though the project is located above the navigable portion of the stream. It is believed that the 1935 amendments to the Federal Water Power Act raise no substantial constitutional questions not covered by these and similar decisions.

50. *Arizona v. California*, 283 U. S. 423 (1930).

Financing the construction of distribution systems to be operated by municipal and other local governmental bodies, often in competition with private concerns; <sup>51</sup> (c) Generation, transmission, distribution, and sale of electricity at wholesale and retail to public and private consumers, often in competition with private concerns; (d) Promotion and financing of the sale of appliances to consumers; (e) Formulation and execution of plans for social, economic and industrial betterment in the principal project areas.

Under what circumstances and subject to what restrictions can the federal government, or its agencies, engage in any or all of these activities? Which of the powers expressly delegated to Congress include the above activities, or, in other words, to which of the delegated powers are any or all of the above activities incidental? It should be borne in mind that the activities of the Tennessee Valley Authority are carried on to some extent on United States government land, acquired during war time for the purpose of constructing nitrate plants for the manufacture of munitions; and also that all the major dams contemplated in the program will be situated on technically navigable streams.<sup>52</sup> It would therefore seem to follow that the constitutional powers which have some bearing on the problem are the following: (1) The Commerce Power,<sup>53</sup> (2) The War and Defense Powers,<sup>54</sup> (3) Control of the Public Domain,<sup>55</sup> (4) The so-called "General Welfare Power."<sup>56</sup> An attempt will be made to show what parts of the federal water power program, as above outlined, come within one or the other of these powers as commonly defined.

### I. The Commerce Power

The more liberal view of the commerce power construes it as extending to any commerce or trade which "affects more states than one." The orthodox view confines it to commerce involving, or immediately incidental to, the actual moving of goods from one state to another. Under any view, however, the control and improvement of harbors and navigable streams,

51. The policy of advancing funds for the construction of public service plants other than systems for the distribution of hydroelectric power originating at federal projects, ties in closely with, although it is not a part of, the water power program.

52. For purposes of federal jurisdiction navigability need not exist at the point where the dam is being constructed. See *Appalachian Electric Power Co. v. Smith*, 4 F. Supp. 6 (W. D. Va. 1933), cited note 49, *supra*.

53. "To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes." U. S. CONST. Art. I, § 8, cl. 3.

54. "To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; To provide and maintain a navy; To make rules for the government and regulation of the land and naval forces; . . . To provide for organizing, arming and disciplining the militia. . . ." U. S. CONST. Art. I, § 8, cl. 12, 13, 14, 16.

55. "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. . . ." U. S. CONST. Art. IV, § 3, cl. 2.

56. "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States. . . ." U. S. CONST. Art. I, § 8, cl. 1.

over which interstate or foreign transportation moves, are within the commerce power.<sup>57</sup> River dams are often built to maintain or improve navigability, and always involve the storage of vast quantities of water with resultant potential power.

It has long been established in this country that a state government, not authorized to engage directly in the business of selling power, may nevertheless, upon construction of a dam in the exercise of a recognized power, dispose by sale of such incidental excess as might otherwise be wasted. Thus, the Supreme Court held in *Kaukauna Water Power Co. v. Green Bay & Mississippi Canal Co.*:<sup>58</sup>

“But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the state may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement.

. . . . .

The true distinction seems to be between cases where the dam is erected for the express or apparent purpose of obtaining a water power to lease to private individuals, or where in building a dam for a public improvement a wholly unnecessary excess of water is created, and cases where the surplus is a mere incident to the public improvement and a reasonable provision for securing an adequate supply of water at all times for such improvement.”

Here the Court draws a sound and logical distinction of fact, but unfortunately the issue to which it applies is apt to be confused by political and economic factors or by the judicial policy of ignoring the motives of the legislature. Such a distinction serves in later decisions as a ready means of conferring judicial approval by indirection on unauthorized acts or activities, without setting a precedent which has to be reversed in the event of a subsequent change of mind. Few courts are above indulging to this extent in intellectual prevarication, if satisfied at the time that the unauthorized activity is beneficial. Thus the Supreme Court was content to overlook a great deal of evidence before concluding as follows with respect to Boulder Canyon Dam:

“. . . the fact that purposes other than navigation will also be served cannot invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power . . . This court may not assume that Congress had no

57. *Wisconsin v. Duluth*, 96 U. S. 379 (1877); *Gibson v. United States*, 166 U. S. 269 (1897); and see authorities cited in *United States v. West Virginia*, 55 Sup. Ct. 641 (1935).

58. 142 U. S. 254, 273 (1891).

purpose to aid navigation, and that its real intention was that the stored water shall be so used as to defeat the declared primary purpose.”<sup>59</sup>

In the face of the Administration's declared primary purpose of manufacturing and distributing cheap electricity, the doctrine of surplus power seems highly artificial as a means of reconciling the activities in question with the commerce power. Nevertheless, it could be made to serve that end as to a part of the present water power program, for many of the projects will benefit navigation and most of them are situated on navigable streams. The cited statutes are drawn carefully so as to include in the expression of legislative intent the advancement of navigation or the improvement of rivers. An excellent example is contained in Section 5 of the amendments to the Muscle Shoals Act, which adds a new Section 9a to the original act, as follows:

“SEC. 9a. The Board is hereby directed in the operation of any dam or reservoir in its possession and control to regulate the stream flow primarily for the purposes of promoting navigation and controlling floods. So far as may be consistent with such purposes, the Board is authorized to provide and operate facilities for the generation of electric energy at any such dam for the use of the Corporation and for the use of the United States or any agency thereof, and the Board is further authorized, whenever an opportunity is afforded, to provide and operate facilities for the generation of electric energy in order to avoid the waste of water power, to transmit and market such power as in this act provided, and thereby, so far as may be practicable, to assist in liquidating the cost or aid in the maintenance of the projects of the Authority.”<sup>60</sup>

But constitutionality on this ground remains uncertain until established in each case, because it rests on a question of fact, and the Supreme Court may always, without reversing itself, reach an adverse conclusion on the record before it. There was ample on the record in the Boulder Canyon case,<sup>61</sup> as there will be in the Tennessee Valley cases, to warrant the conclusion that improvement of navigation was a minor and incidental purpose in the construction of the dam.

The conservative view is ably expressed in the opinion of Judge Grubb in the case of *Ashwander v. Tennessee Valley Authority*,<sup>62</sup> already referred to. He holds it to be obvious from the evidence presented that the Author-

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59. *Arizona v. California*, 283 U. S. 423, 456 (1931). There was before the Court, *inter alia*, article IV of the Colorado River Compact [H. R. Doc. No. 605, 67th Cong., 4th Sess., Ser. No. 8215 (1923) 10], which declared the River no longer navigable, and to which the Act was expressly subject.

60. P. L. No. 412, 74th Cong., 1st Sess. (1935) § 9 (a).

61. *Arizona v. California*, 283 U. S. 423 (1930).

62. 8 F. Supp. 893, 896 (N. D. Ala. 1934), cited note 37, *supra*.

ity was created for the principal purpose of producing and distributing electricity in competition with private utilities, any improvement in navigation or promotion of national defense being definitely subordinate and incidental to the principal purpose. His conclusions are persuasive, but may be avoided on perfectly plausible grounds, as illustrated in the opinion overruling him, which holds that as the dam itself was lawfully erected and bears a reasonable relation to possible war-time requirements as well as to the improvement of navigation, the right to dispose of its surplus power should not be limited to such as might be accidentally or unintentionally produced, for the surplus power is government property within the control of Congress and must either be wasted or used. The opinion contains this language: "The Government of the United States cannot engage at will in private business, but it by no means follows that it cannot sell property which it owns, even though in doing so it may enter into competition with other public or private owners of property."<sup>63</sup>

But even on the broadest interpretation of the surplus water power theory, it is difficult to find authority for the federal government's retail distribution of electricity or transmission thereof to distant markets. Specific powers of this nature granted to the Tennessee Valley Authority can hardly be termed necessary incidents of the disposal of surplus water power. As pointed out by James M. Beck and Newton D. Baker, there must be some limit to the pyramiding of one incidental power upon another.<sup>64</sup> Since the constitutionality of selling water power at all depends upon its being a mere incident of navigation improvement, national defense, or some other plainly granted power, it should take place no farther than necessary, geographically, from the project built in exercise of the granted power. In other words, it may fairly be said that activities incidental to an incidental power are not truly incidental to the original power, if they extend to areas otherwise untouched by the exercise of the original power.

The fact that much of the power generated at Muscle Shoals, and at other federal projects, is being or will be conveyed across state lines can have no bearing on the power of the federal government to own and operate the means of its conveyance, or engage in the business of conveying it. The commerce clause can hardly be construed as authority to the federal government to engage in every business conducted across state lines.

Thus, with respect to the construction of dams and hydroelectric power plants, with respect to some incidental transmission of electricity, and with respect to the sale to public or private consumers, at or near source, of the electricity generated at such plants, there is a possible but artificial justification under the commerce clause. Distribution and sale of electricity at retail

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63. U. S. L. Week, July 23, 1935, at 1066 (C. C. A. 5th, 1935).

64. BECK AND BAKER, OPINION RENDERED TO MR. THOMAS N. McCARTER, PRESIDENT OF THE EDISON ELECTRIC INSTITUTE (1934) 44, 45.

after transmission over long distances, and promotional activities in general would seem to be outside the scope even of that doubtful rule.

The interstate commerce conception has possible bearing on another phase of the water power program, namely, loans and grants by the Public Works Administration on behalf of local public service projects. Such projects, whether municipal or state-owned, are almost invariably wholly intrastate. The question is then raised whether federal funds can properly be devoted to them. As already indicated, the crossing of state lines does not give the federal government power to engage in the utility business. But where the federal government merely lends or gives to some other body the money with which a public service project is constructed, the fact that the project will or will not operate across state lines may be said to affect the question of whether the federal appropriation is in furtherance of interstate commerce. If purely intrastate, as is usually the case, constitutionality of the loan or grant must rest on some other ground. In the *Concordia Case*, which was one of the first decisions on this phase of New Deal activity, the court said of Title II of the N. I. R. A.: "The Congress only intended to promote and aid instrumentalities of interstate commerce . . . it would have no authority to grant aid to the construction of a plant over which it would have no legislative authority."<sup>65</sup> But it is most unlikely that Congress intended to limit the Federal Emergency Administration of Public Works to loans for the construction of interstate projects. Those charged with the administration of the act have certainly adopted a much broader view, and they would seem to be justified by its language.

The real significance of the commerce clause to the present problem is in the situations where federal agencies participate directly in water power development. Artificiality pervades its application even there, for to conceive of these huge hydroelectric power plants, which sell to, and in competition with, private utilities, as proper enterprises of the federal government, merely because of the effect of the dam on river navigation, is difficult to say the least. But from the point of view of the constitutional lawyer, such a conception is perfectly natural. And historically it is true that most of the federal government's activity in the water power field results solely from the fact that potential hydroelectric power is a necessary incident in the damming of a navigable stream.

## II. National Defense

Section 124 of the National Defense Act of 1917<sup>66</sup> empowered President Wilson to manufacture "nitrates and other products for munitions of war" by "water power or any other power" and to "construct, maintain

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65. *Missouri Public Service Co. v. City of Concordia*, 8 F. Supp. 1, 3 (W. D. Mo. 1934).  
66. 39 STAT. 215 (1916), 50 U. S. C. A. § 79 (1916).

and operate" on a site or sites to be chosen by him "dams . . . power houses," or other plants "for the generation of electrical or other power." It provides: "The products of such plants shall be used . . . for military and naval purposes to the extent . . . necessary, and any surplus . . . not required shall be sold and disposed of . . ."

By authority of these provisions, Wilson Dam was constructed at Muscle Shoals to supply power to two large nitrate plants adjoining it. No possible question could be raised as to the constitutionality of the act and of this execution of its mandate. The end of every war leaves in government hands a multitude of instrumentalities of emergency, of which the government divests itself as rapidly as possible, consistent with economy and good sense. Some activities assumed during war time are justifiably retained as peace time functions in the interest of national defense. Arsenals, shipyards, airplane factories and factories for the production of uniforms and equipment are not necessarily shut down when hostilities terminate. Some attempts were made to dispose of the Muscle Shoals plants.<sup>67</sup> Certainly, pending such negotiations and for a reasonable number of years after the war, the constitutionality of owning, operating and disposing of the power generated at this dam was clear as an incident of a wartime activity.

It also seems clear that the federal government would have the constitutional power to retain the nitrate plants and the hydroelectric plant during peacetime as an adjunct of the War Department. A steam electric power plant can, of course, be controlled in its production of power, and if the power plant at an arsenal or navy yard factory should attempt to sell electricity in competition with the local public service company, just criticism would follow. But hydroelectric power production depends on the flow of the river, which cannot be turned on and off. The disposition by sale or lease of the excess which would otherwise be wasted is not difficult to defend as incidental to the acknowledged defense powers. This view is developed in the opinion of the Circuit Court of Appeals in *Tennessee Valley Authority v. Ashwander*, as follows:

"Water power is property *sui generis*; unlike most other forms of property it cannot be put away and kept for future use or sale, but it must be either converted into electricity and used up as it is released from storage or allowed to go to waste. . . . As a practical matter, there would be no market for the incidental or accidental surplus created in the honest effort to produce only enough electricity to supply strictly governmental requirements; for no user, public or private, of electricity would become a customer unless assurance could be given of a firm and dependable supply."<sup>68</sup>

67. U. S. Chamber of Commerce, *op. cit. supra* note 8, c. VIII.

68. *Tennessee Valley Authority v. Ashwander*, 78 F. (2d) 578, 581 (C. C. A. 5th, 1935). (C. C. A. 5th, 1935).



Following the close of the war, the surplus output of Muscle Shoals was disposed of to the Alabama Power Company. This was doubtless regarded as a temporary measure pending disposition of the plant itself. The figures show how small a proportion of the output was necessary for maintenance of the government properties.<sup>69</sup> The largest part passed into direct competition with steam electric and other power sources to which the Alabama Power Company must otherwise have resorted.

The Muscle Shoals Act is the disposition of these properties finally determined on by Congress. Perhaps because private offers were inadequate, perhaps for other reasons, retention and expansion was the policy adopted. Thus, in addition to the commerce clause, the government has the national defense power as authority for the disposal of surplus electricity from at least one of the Muscle Shoals dams. But the scope of activities so authorized would seem to be restricted in just the same way as under the commerce clause. Transmission to, and distribution at, distant markets are not truly incidental to the granted power. Moreover, the Tennessee Valley project is obviously not in fact an exercise of the defense power, whatever its history may have been, any more than it is a project for the improvement of navigation. The production and sale of power are plainly its principal objects today.

In 1927 the sale of 99 per cent of the power produced to a private company was perhaps still a mere incident of the execution of the National Defense Act. But having adopted in 1933 a permanent Muscle Shoals policy "in the interest of national defense" and "to improve navigation in the Tennessee River," the sale of a similar percentage of the output as surplus power casts doubt on the sincerity of Congress in its expression of legislative intent. The national defense power adds cumulative effect to the conclusions reached with respect to the commerce clause. Neither one nor the other can justify the whole program, or even the whole program of the Tennessee Valley Authority, without flagrant disregard of the facts.

### III. *Control of the Public Domain*

With respect to some of the important federal projects it will be contended that the government is merely exercising its proprietary powers over the public domain. Aside from the merits of this contention, its relevancy depends, of course, primarily on whether the dam site is federal property, but secondly, on how and why it became so.

Article IV, Section 3, of the Constitution provides: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

Public domain is acquired by various means, including conquest, treaty,

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69. See *Alabama v. United States*, 38 F. (2d) 897-898 (Ct. Cl. 1930), *rev'd for lack of jurisdiction*, 282 U. S. 502 (1931).

purchase, condemnation, foreclosure, and tax sale. Acquisition by condemnation or by private purchase normally relates to a specific and limited use. Post offices and penitentiaries are familiar examples. But acquisition by other means, as in the case of new territory, adds property to the public domain for any such use or disposition as may be lawful.

The site of Muscle Shoals dam was acquired for a specific constitutional purpose. With the cessation of hostilities the occasion for accomplishing that purpose in large measure disappeared. To this extent the original use for the property so acquired was abandoned, and the federal government was left in possession of a considerable plant no longer assigned to any particular use.

In such and similar cases, if any, there is room for argument that the government's power over the property in question is the same as over new territory, or over land acquired for taxes. As to Boulder Dam, and such other sites as may be acquired by federal agencies under the direction of the Public Works Administration, the situation is somewhat different, for the acts applicable to those projects state the purposes of acquisition and would seem to limit the use of land so acquired to those specific purposes. Only abandonment of those purposes by necessity and the passage of further legislation putting such land to new uses, would raise the same problem as applies to the Tennessee Valley Authority. Certainly it is clear that the power of the federal government to engage in a particular activity cannot be increased by the acquisition of real estate for the purpose of conducting it.

It follows that at most only a small part of the federal water power program can be based, for constitutionality, on control of the public domain. As to that part, the real question is whether land acquired by the federal government without restriction as to purpose, or for a purpose since abandoned, can be used by the federal government for a purpose for which it could not in the first instance have been expressly acquired. In other words, to what extent does federal proprietorship in the public domain attract special incidents or powers not delegated to Congress otherwise than by Article IV, Section 3, as quoted above.

The cases contain broad language interpreting this section of the constitution. The following excerpts will illustrate:

"It may deal with such lands precisely as a private individual may deal with his farming property."<sup>70</sup>

". . . Congress not only has legislative power over the public domain, but it also exercises the powers of the proprietor therein."<sup>71</sup>

"Congress . . . was authorized to deal with it as a private individual may deal with land owned by him."<sup>72</sup>

70. *Camfield v. United States*, 167 U. S. 518, 524 (1897).

71. *United States v. Midwest Oil Co.*, 236 U. S. 459, 474 (1914).

72. *Sinclair v. United States*, 279 U. S. 263, 297 (1929).

But the context from which these quotations are removed destroys much of their strength as applied to the present problem. While the federal government has a free hand to control or prevent exploitation of the public domain, having powers at least equal to those of private owners to this general end, it cannot by mere virtue of title make use of property for any purpose whatsoever, governmental or not.

Many of the cases construing Article IV, Section 3, of the Constitution, arose in the development of new territory in the West during the latter part of the last century. Plot sections of prairie land were sold on express condition that no part of the public domain should be fenced in or enclosed, the purpose being to conserve those areas as open ranges for sheep and cattle grazing. To further this policy it was customary to sell to private persons only the alternate sections, so that each private section or square was bounded by four public sections, and *vice versa*, similar to the arrangement of a checkerboard. In one case<sup>73</sup> it was argued by private owners of such sections that sheep grazing from adjoining sections of the public domain ruined the range for cattle. The Supreme Court held that the federal government was within its rights in demanding that open grazing continue in certain areas, and that private persons acquiring land in those areas had no right to complain. Some years later, an ingenious settler, owning the private sections of a considerable range, attempted to evade the enclosure prohibition by placing fences just inside the property line of the alternate sections bounding the range, which resulted in sufficient obstruction to effect his general purpose. The federal government was sustained in ordering the removal of the fences.<sup>74</sup> On the other hand, where public lands were held as forest reserves, not open for grazing without permit, the federal government was able to enjoin citizens from putting their cattle to graze at nearby points, in view of the fact that the cattle would trespass.<sup>75</sup>

In one case, where it was held that local taxes on land acquired and held by the federal government for non-payment of federal taxes would be improper, the Court said:

“The United States do not and cannot hold property, as a monarch may, for private or personal purposes. All the property and rev-

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73. *Buford v. Houtz*, 133 U. S. 320 (1890).

74. *Camfield v. United States*, 167 U. S. 518 (1897).

75. *Light v. United States*, 220 U. S. 523 (1910). In other cases the power of Congress over the public domain has been cited in connection with the powers of the Senate Committee investigating a private lease of naval oil reserves, *Sinclair v. United States*, 279 U. S. 263 (1929), the power of the Executive, without specific Congressional sanction, to direct the withdrawal of such reserves from public acquisition, *United States v. Midwest Oil Co.*, 236 U. S. 459 (1914), and the power of Congress to dispose by appropriation, in accordance with public interest, of non-navigable waters on the public domain, so that riparian owners with title through patent or public grant were subject in their use of such water to the provisions of the Desert Land Act of March 3, 1877, c. 107, Section 1, 43 U. S. C. A. 321 (1928), *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142 (1935).

enues of the United States must be held and applied, as all taxes, duties, imposts, and excises must be laid and collected 'to pay the debts and provide for the common defense and general welfare of the United States.' " 76

This language can be regarded as expressing the true qualification to which all statements comparing the federal proprietorship to private ownership are necessarily subject. Broad statements of such a comparison usually occur in cases where a public purpose in the proposed use of land is obvious. And more particularly, the cases bring out that any public use which may be made of the public domain must be confined closely to its borders, unless such use, and the activities thereunder, are within some other granted power. There is no reason to regard as justifiable an activity which originates on public land, but has its principal effects in the neighboring states.

Even the combination of federal ownership of large areas of land in a particular vicinity, and an acute reclamation or flood control problem which the separate states are unable to solve, does not enlarge the enumerated federal powers. In *Kansas v. Colorado*,<sup>77</sup> where the two states in question were disputing their respective rights in the flow of a river which both needed badly for irrigation, and where a large part of the arid land was public domain, the Supreme Court held that the federal government, intervenor in the action, would be without power to assume control of reclamation of the watershed or to supersede the state governments with its own legislation. The Court said: "But as our national territory has been enlarged, we have within our borders extensive tracts of arid lands, which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the federal government. But if no such power has been granted, none can be exercised."<sup>78</sup>

This decision bears an interesting analogy to one aspect of the Tennessee Valley situation. Does the need for development and reclamation of the Tennessee watershed, coupled with federal ownership of land therein, warrant federal intervention to handle the problem as a whole? The orthodox answer would seem to be "no"; and this should apply generally to situations where flood control and reclamation are spoken of as established federal powers.

Control over the public domain carries with it a wide range of incidental powers, dependent on the purposes for which, and the means by which, the land in question was acquired, but those powers are almost wholly confined in activities local to the area in question. The ownership of land does not empower the federal government to use such land as headquarters from

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76. *Van Brocklin v. Anderson*, 117 U. S. 151, 158 (1886).

77. 206 U. S. 46 (1906).

78. *Id.* at 91.

which to conduct activities beyond the public domain that are not authorized otherwise than by Article IV, Section 3.<sup>79</sup>

It may be observed in passing that Article IV, Section 3, is mentioned in a somewhat unusual connection in the Circuit Court of Appeals' opinion in the *Ashwander Case*.<sup>80</sup> The court suggests at one point that the federal government has merely chosen Tennessee Valley Authority as a means of disposing of certain of its personal property, namely, water power, within the powers of disposition conferred by that clause of the Constitution. The decision was based on other and stronger grounds, but the court's suggestion is worthy of comment. Certainly Congress has power to "dispose of" and "to make all needful rules and regulations respecting" both real and personal property which belongs to the federal government; but the question is rather whether Congress is acting within its powers when it launches a program for the production of personal property (water power) for sale to the public in competition with private industry. Personal property lawfully acquired or produced, such as surplus army supplies, may lawfully be sold. It does not follow, however, that the sale of T. V. A. power is constitutional, unless it is established that such power is being lawfully acquired or produced by the federal government.

#### IV. *The General Welfare Clause*

To conceive within the Constitution a field for the exercise of federal legislative power as broad as the words "general welfare" imply, is to conceive a new form of government. If the Tenth Amendment means what it says, and can still be enforced, Congress surely does not have power to legislate on any subject designed to promote "the general welfare of the United States." Whether it should have, or ever will have, such powers, is not a subject for discussion in this article.

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79. In *Alabama v. United States*, 38 F. (2d) 897 (Ct. Cl. 1930), cited notes 40 and 69, *supra*, which was reversed, 282 U. S. 502 (1931), because of lack of jurisdiction in the Court of Claims, that court considered whether or not the sale of surplus Muscle Shoals power by the federal government was taxable by the State of Alabama as a proprietary or private activity. The majority concluded that such sale, as authorized by Congress, constituted a public or governmental activity, exempt from tax. One judge, specially concurring, wrote as follows: ". . . if the national government was engaged in a business of creating and selling electric power for all persons who should apply therefor and not simply disposing of surplus power for which it had no use and which would otherwise go to waste, by a sale or lease to a single company, . . . a very different situation would be presented, for, in my judgment, it would not be carrying out any governmental function or doing any act which was necessary in order that a governmental function might be fully exercised." At 906. The able opinions in that case suggest that federal power to act in a proprietary capacity is limited and that even in controlling the public domain the government acts really in its public or governmental capacity.

80. The following sentence appears in the opinion: "Congress, in the exercise of its power, under article 4, § 3, cl. 2, of the Constitution, to dispose of property belonging to the United States, may dispose of water power created at Wilson Dam as freely as it may of any other government property." *Tennessee Valley Authority v. Ashwander*, 78 F. (2d) 578 (C. C. A. 5th, 1935).

An unfortunate opportunity for misinterpretation inheres in the language of Article I, Section 8 of Constitution: "The Congress shall have power to lay and collect, taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." The beginning and end of this paragraph clearly label it as a grant of taxing power. An examination of the succeeding paragraphs of Section 8 of Article I indicates that each embraces only one power. A fair interpretation of the first paragraph would therefore be to give to the phrase "to pay the debts and provide for the common defense and general welfare of the United States" an adverbial effect as though prefixed by "in order to" or some similar phrase. Only by strained reasoning can there be found a distinct grant of power to engage in general welfare activities.

Even after establishing this restriction, the paragraph in question lends itself to various constructions. Doubtless the power to tax for certain purposes includes, and in fact means, the power to tax and then to appropriate in furtherance of those purposes. The first question is whether "common defense and general welfare" include purposes other than those specified in the succeeding clauses of Article I, Section 8, or elsewhere in the Constitution, so that taxes may be levied to finance or subsidize activities in which the federal government cannot itself engage. Both sides of this question have been urged, but for the most part by commentators rather than by judges. The strict view is generally attributed to James Madison<sup>81</sup> and the more liberal view to Alexander Hamilton.<sup>82</sup> It would be difficult to say which view is prevailing.<sup>83</sup> But one thing is quite clear, namely, that even after giving full weight to the incidental<sup>84</sup> and emergency powers of Congress, it would be impossible to fit all the recent objects of federal appropriation within a strict interpretation of the powers enumerated in the other sections and clauses of the Constitution.<sup>85</sup> Thus, a strict interpretation of the general welfare clause necessitates a loose interpretation of the succeeding clauses of Article I, Section 8. Otherwise a great many federal appropriations would be manifestly unconstitutional.

But going further and assuming the so-called Hamiltonian view as correct, what practical limitation would there be upon federal activities under

81. THE FEDERALIST, No. 41.

82. See 4 WORKS OF ALEXANDER HAMILTON (Lodge ed. 1904) 150-152.

83. For the stricter view: 1 TUCKER, THE CONSTITUTION OF THE UNITED STATES (1899) § 224; LANDOW, CONSTITUTIONAL HISTORY OF THE UNITED STATES (1889) §§ 143 ff. For the more liberal view: 1 HARE, CONSTITUTIONAL LAW (1889) §§ 242 ff.; 1 STORY, COMMENTARIES ON THE CONSTITUTION (5th ed. 1905) §§ 921 ff.

84. "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or officer thereof." U. S. CONST. Art. I, § 8, cl. 18.

85. Cf. CORWIN, THE TWILIGHT OF THE SUPREME COURT (1934) 151, 152.

this power to tax and appropriate? By carefully drafted appropriation bills any activity which Congress determines to subsidize for the purpose of promoting "general welfare" might be regulated and controlled as though within the powers specifically granted. The difficulty is that the distinction between the power to legislate on a certain subject and the power to appropriate for it, is narrow if existent at all.

One clear-cut factor upon which a distinction could and should be based, is whether or not the beneficiary of the appropriation is a federal department or agency. If it is, and assuming the activity in question to be one in which the federal government could not engage unless by virtue of this clause, it is submitted that the appropriation does not fall within the general welfare spending power. A further or alternative delimitation of the power can be based on the extent to which the grant of funds, rather than federal control or management of the activity in which the funds are to be spent, is predominant in the legislative purpose. Such a standard is obviously vague and would be difficult to enforce with any degree of realism, as long as courts accept declarations of legislative intent at face value. But some such standard would seem essential to any rational use of the more liberal view of the spending power created by the general welfare clause.

One of the most peculiar features of the general welfare clause is the studied consistency with which the United States Supreme Court has ignored it, regardless of arguments of counsel addressed directly to it.<sup>86</sup> In numerous cases the federal activity under attack has no place in the constitutional scheme unless, in order to render applicable a granted power which is not in point except incidentally or by fiction, the obvious motives of Congress are disregarded, or unless a power to legislate by appropriation for the general welfare is supposed to exist unrestricted. The latter approach would appear more direct, and intellectually more honest, assuming the result to be the same. However, since the Supreme Court has never seen fit to express or adopt a construction of the clause in question which would establish the existence of such a power, although in numerous cases it would have been extremely convenient for it to have done so, there is much to be said for the view, as expressed by Madison, that the taxing and spending power extends only to such matters of common defense and general welfare as are entrusted to the federal government by the more specific provisions of the Constitution. In any event, a Supreme Court pronouncement on the meaning of the general welfare clause would be welcome from many points of view.

In the lower courts only four cases have been found dealing fully with the scope of this clause. All of them are District Court cases, one from

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86. Nicholson, *The Federal Spending Power* (1934), 9 TEMPLE L. Q. 3, 8, 14; Note (1934) 48 HARV. L. REV. 89, 94; cf. *Missouri Utilities Co. v. City of California*, 8 F. Supp. 454, 462 (W. D. Mo. 1934).

Missouri decided in 1898,<sup>87</sup> and the others from Missouri,<sup>88</sup> Idaho<sup>89</sup> and South Carolina<sup>90</sup> decided recently as a result of New Deal legislation. In the early case, which involved the power of the federal government to regulate and inspect slaughter houses in Missouri, the court followed Madison, confining the phrase "common defense and general welfare" to the activities and purposes embraced by the other granted powers. In so holding, it expressly rejected the contention that a general welfare power existed outside of the taxing and tax-spending power. In the three recent cases the latter contention is not advanced; no more is claimed for the clause than a statement of the boundaries of the spending power. But the three cases are in direct conflict as to where those boundaries lie.

In the *City of California Case*,<sup>91</sup> Judge Otis sustained the legality of P. W. A. loans and grants for the construction of municipal power plants, on the theory that the federal government can spend or lend for any purpose reasonably calculated, of itself or in conjunction with other elements of a national plan, to promote general welfare or relieve a general crisis. The opinion is elaborate and carefully considered. The court said:

"My conclusion is that the Congress has the power to appropriate money for the promotion of the general welfare and that it is not restricted in so doing to objects germane to its other delegated powers. Congress therefore has the power to appropriate money for the relief of any condition of unemployment which is not merely local but is national in its extent and hence inimical to the general welfare."<sup>92</sup>

On the other hand, Judge Cavanah of Idaho concluded that the specifically enumerated powers delimit the spending power, leaving no constitutional ground for P. W. A. loans and grants to projects over which the federal government has no legislative power or control. This language appears in his opinion:

". . . if Congress is not authorized to legislate upon a certain subject-matter, then it would follow that it may not appropriate money to carry out such unauthorized subject-matter. It certainly would not have power in the first instance to authorize the Administrator to construct the system in the city of Coeur d'Alene, and, if so, then an attempt to appropriate money for the city to do so would be indirectly exercising a power it did not have."<sup>93</sup>

Similarly, Judge Watkins of South Carolina rejected the so-called Hamiltonian view of the general welfare clause, and found expressly that

87. *United States v. Boyer*, 85 Fed. 425 (W. D. Mo. 1898).

88. *Missouri Utilities Co. v. City of California*, 8 F. Supp. 454 (W. D. Mo. 1934).

89. *Washington Power Co. v. City of Coeur D'Alene*, 9 F. Supp. 263 (D. Idaho 1934).

90. *Duke Power Co. v. Greenwood County*, 10 F. Supp. 854 (W. D. S. C. 1935).

91. 8 F. Supp. 454 (W. D. Mo. 1934).

92. *Id.* at 463.

93. *Washington Power Co. v. City of Coeur D'Alene*, 9 F. Supp. 263, 270 (D. Idaho 1934); *cf. Missouri Public Service Co. v. City of Concordia*, 8 F. Supp. 1 (W. D. Mo. 1934).



the power of appropriation of federal taxes was limited to the furtherance of the specific powers granted in subsequent clauses of Article I, Section 8, and elsewhere in the Constitution. He held that neither the commerce power nor the taxing and spending power is a justification for P. W. A. loans in aid of local projects. He stated:

“Congress may not legislate either for the establishment or the support of such local enterprises under the guise of general welfare. To permit this to be done would be to destroy the barriers provided in specific sections of the Constitution against congressional encroachment upon states rights and local self-government.”<sup>94</sup>

Serious doubt must continue to prevail as to the real meaning of the general welfare clause. Surely, however, the construction of dams, transmission lines, and distribution systems, and the generation and distribution of power by federal agencies, although financed by appropriation of federal funds, are not within the general welfare power under any view authoritatively expressed up to the present time. Obviously, such activities are not the normal incidents of the taxing power. Appropriations are necessarily involved, but the paramount feature is federal production and disposition of hydroelectric power, which would seem to require separate and specific constitutional sanction, apart from the power to spend.

An important part of this water power program consists, however, in financing the construction of local plants and distribution systems by lesser governmental bodies. While P. W. A. loans and grants for local public works are not always, or even usually, related to water power projects,<sup>95</sup> such financing does in many instances play a part in the water power program, as is witnessed in connection with the Tennessee Valley Authority project;<sup>96</sup> and when other federal projects come into full operation, P. W. A. will doubtless co-operate by assisting prospective municipal customers.

All such financing is to be distinguished from expenditures or advances in furtherance of the instrumentalities by which conceded federal powers are exercised. For instance, mail subsidies under the post office power, rail subsidies or loans under the interstate commerce power, and loans to munitions manufacturers and shipyards during war time, or to national banks

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94. *Duke Power Co. v. Greenwood County*, 10 F. Supp. 854, 869 (W. D. S. C. 1935), cited note 90, *supra*.

95. In *Washington Power Co. v. City of Coeur D'Alene*, 9 F. Supp. 263 (D. Idaho 1934), cited note 89, *supra*, the complaining private utility distributed hydroelectric power, but the proposed municipal plant was to be operated by Diesel engines. Also, in *Missouri Utilities Co. v. City of California*, 8 F. Supp. 454 (W. D. Mo. 1934), cited note 88, *supra*, and in *Missouri Public Service Co. v. City of Concordia*, 8 F. Supp. 1 (W. D. Mo. 1934), there is nothing to indicate that the purpose of the subsidy is in any way related to a federal water power project. See also *City of Allegan v. Consumers Power Co.*, 71 F. (2d) 477 (C. C. A. 6th, 1934).

96. See *Ashwander v. Tennessee Valley Authority*, 8 F. Supp. 893 (N. D. Ala. 1934), *rev'd*, 78 F. (2d) 578 (C. C. A. 5th, 1935); *Duke Power Co. v. Greenwood County*, 10 F. Supp. 854 (W. D. S. C. 1935).

in the midst of economic stress, can all be easily sustained. But even where no similarly direct connection with an enumerated power is to be found, it is often impossible to secure a judicial test of federal authority, because all persons affected otherwise than remotely are apt to be benefited. In consequence the federal government exercises a broad, practical spending power which needs no constitutional sanction. So far, however, as such a power may be said to exist by virtue of the absence of challenge, it is clearly unavailable to sustain P. W. A. loans for the construction of municipal public works. The private utilities and their stockholders are complaining vociferously and have been able in various instances<sup>97</sup> to establish legal grounds of complaint, other than merely as federal taxpayers, a status which has been held of itself insufficient.<sup>98</sup>

Such complaint rests not merely on the fact of subsidized municipal competition in the face of an exclusive franchise (public service franchises are usually exclusive only as against private competitors<sup>99</sup>), but rather on illegality inherent in the municipal project by reason of the federal government's participation therein. As to P. W. A. loans for any local project, it may be contended that the spending power has been exceeded, if the federal government would not have power itself to operate or construct the project. As to P. W. A. loans to municipalities co-operating with the water power program by contracting to purchase federal hydroelectric power, the further question arises as to whether, assuming the first contention is rejected, the loan can still be attacked because the federal project producing the power is declared to be unconstitutional. Judge Grubb restrained some fourteen towns in Alabama from accepting P. W. A. loans on this very ground.<sup>100</sup> He held that generally speaking P. W. A. loans and grants for the construction of local projects are within the spending power as a measure in relief of national unemployment conditions, but that the Federal Emergency Administration of Public Works was obviously acting in concert with the Tennessee Valley Authority, and that the unconstitutionality of the program and activities of the latter infected the loans of the former.

While this decision has been overruled by the Circuit Court of Appeals on grounds already described, the point of view is interesting and may or may not be adopted by the Supreme Court if it in turn should overrule the

97. *Ashwander v. Tennessee Valley Authority*, 8 F. Supp. 893 (N. D. Ala. 1934); *Missouri Public Service Co. v. City of Concordia*, 8 F. Supp. 1 (W. D. Mo. 1934); *Washington Power Co. v. City of Coeur D'Alene*, 9 F. Supp. 263 (D. Idaho 1934); *Duke Power Co. v. Greenwood County*, 10 F. Supp. 854 (W. D. S. C. 1935). And see Review by Henry T. Hunt, Esq., of cases attacking the constitutionality of Title II of the National Industrial Recovery Act and P. W. A. loans made thereunder, issued by the Administrator July 29, 1935. Prentice-Hall, *Federal Trade and Industry Service* (2d ed. 1935) § 40024.

98. *Massachusetts v. Mellon*, 262 U. S. 447 (1922).

99. *Knoxville Water Co. v. Knoxville*, 200 U. S. 22 (1905); *Madera Water Works v. Madera*, 228 U. S. 454 (1912); cf. *Puget Sound Power and Light Co. v. City of Seattle*, 291 U. S. 619 (1934).

100. *Ashwander v. Tennessee Valley Authority*, 8 F. Supp. 893 (N. D. Ala. 1934).

Circuit Court of Appeals on the main point of the constitutionality of the activities of the Authority. The issue of fact as to the existence or non-existence of conspiracy or concerted activity between departments or agencies of the federal government in executing separate and distinct statutes could well be used, especially in later cases, as a pretext for avoiding unpopular decisions.

Of course, accepting the premise that T. V. A. is illegal, the further ruling against P. W. A. loans for the ejection of local municipal outlets for T. V. A. power is hardly important to the program as a whole. That premise alone would defeat the program, for local loans have nothing to do with federal water power except to round out the activities of the major projects which produce it.

Assuming, however, that the activities of Tennessee Valley Authority, or of any other similar enterprise of the future, are sustained by the Supreme Court, then the question of the legality of P. W. A. loans and grants as a part of the water power program is simply the general question, already discussed, of whether the spending power covers money advanced for the purpose in question. In view of the previous policy of non-interference adhered to by the Supreme Court in respect to expenditures authorized by Act of Congress, it seems rather doubtful that those lower court rulings<sup>101</sup> which deny the power of the government to lend and grant for general welfare purposes other than those specifically enumerated in the Constitution can be affirmed, unless upon some such general finding as that of Judge Grubb, to the effect that the government expenditures are a part of a larger illegal program. Such decisions can be reversed on grounds which will not necessitate an interpretation of the general welfare clause.<sup>102</sup> It might be held that even if the loans were unauthorized, the municipality would suffer no loss and the private utility would have no standing to complain by reason of such illegality. It would also be possible, in those cases where the local plant is constructed with a view to consuming or distributing hydroelectric power produced by a federal project, to regard the loan and grant for its construction as incidental to the constitutional power upon which the federal project is based. Inasmuch, however, as a federal project, such as the Tennessee Valley Authority, can only be sustained as itself incidental to the commerce, or some other specific, power, the latter view seems unsound because it pyramids one incidental power on another. At all events, there are logical and practical grounds for believing that federal financing as a part of the water power program is reasonably secure so long as the major federal projects are upheld.

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101. *Missouri Public Service Co. v. City of Concordia*; *Washington Power Co. v. City of Coeur D'Alene*, both *supra* note 93.

102. *Cf. City of Allegan v. Consumers Power Co.*, 71 F. (2d) 477 (C. C. A. 6th, 1934).

It is interesting and curious to note that the conservative policy of combining a 55 per cent loan with each 45 per cent grant furnishes a handy weapon to those who oppose the program. Private utilities, and other taxpayers in the locality, have an acknowledged standing to secure judicial opinion on the legality of local borrowings and bond issues. The grant is not only smaller than the loan, but is tied up with it as a part of the same transaction, so that a decision against the loan, especially if on the ground of lack of federal power, effectively obstructs them both. If the grant were 100 per cent. instead of 45 per cent., the litigious taxpayer, as such, would have a very doubtful standing in court.

Much has been and will be said concerning the alleged impropriety of subsidized municipal competition where private capital has been invested in good faith on the strength of valid franchises. But the destruction of private utilities by such competition has been held to be neither an impairment of the franchise contract, nor a taking of property without due process of law.<sup>103</sup> The fact that the municipal subsidy is reinforced by federal funds alters the situation only if such federal financing is illegal in itself.

### *Conclusion*

As times change and new and varying economic conditions arise, it is natural to find a continuous record of struggle by conservative authorities to prevent the enactment and enforcement of measures intended for social betterment, but designed on patterns unknown when the organic law was established. On the one hand, it is plain that progress itself shapes new patterns in place of the old, and that no Constitution restricted in scope to the subjects comprehended by its authors could be expected to outlive them very long. On the other hand, there must be and are certain fundamental principles inherent in the Constitution which are not the subject of compromise. The fear that the Supreme Court is abdicating its rule in favor of political and popular agitations of the moment is inevitably voiced when important decisions are liberal. Recent decisions, however, should set at rest such groundless fears. When Congress oversteps the bounds, the Court has no hesitancy in saying so, and its word is final. The fact is too often overlooked that intelligent interpretation of organic law resolves itself naturally and properly into a sincere effort to search out and define a justification for new measures adopted by the legislative branch. The opposite, or truly reactionary, approach would serve not at all in preserving the Constitution and would simply encourage revolt.

Bearing all this in mind, and giving all benefit of doubt to the Administration, it is difficult to escape the conclusion that the federal water power program as a whole—as a federal enterprise and in its present form—is

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103. Cases cited note 99, *supra*.

constitutionally indefensible. In the discussion above emphasis and attention have necessarily been given to the technical rules in which judicial opinion is couched. These rules often seem far removed from fact and even from the legal merits of the question; but after all, the grounds on which a decision is made are often concealed by those expressed in the opinion. And legal comment can properly concern itself with the technical concepts of which the opinions are composed, if only because historically, at least, they have a direct relation to fundamental principles. Whether the Supreme Court will employ one set of rules to uphold, or another to strike down, the Tennessee Valley Authority depends on the views of the court as to whether the act, and the activities thereunder, offend the fundamental principles of our system of government. In forecasting those views, the facility with which one set or another of technical concepts apply to the facts of the case is some indication of what to expect. The rules which would sustain T. V. A. and the rest of the water power program are, without exception, difficult to apply to the facts.

The commerce power protects the program only so far as it is incidental to the improvement of navigation. The war and defense powers seem relevant to one project only, and to it only so far as its activities are incidental to the manufacture of war products or the disposition of property acquired during war time. The proprietary power is equally limited in its application, and the general welfare power, unless it is to receive a long-since discredited construction, is authority at most for the incidental features of the program which are dependent for their existence on the validity of the whole.

Fundamentally, the trouble would seem to be with the extent to which the program involves federal participation in the various steps of producing and distributing power. In the Boulder Dam case there was not—nor could there have been—any evidence introduced of a general plan by a federal agency to manufacture, distribute and sell electricity and take over the economic development of the area. The production of power on any navigable stream is subject to control by the Federal Power Commission. Boulder Dam power, as leased, is also subject to the control of the Interior Department, lessor. The difference is not essential. Under the present plan of operation the federal government plays the part of an arbiter or stakeholder for the various interests and communities within reach of the stream, its own interest as builder and lessor being one of the largest. But the dam, as completed, may well be compared with a natural resource or phenomenon, belonging to the people and developed (operated) by private enterprise or by the states under federal control.

The New Deal water power projects are not the same. The federal government abandons the merely paternalistic role of a regulatory commis-

sion or possibly of an inquisitive landlord, and assumes the role—through corporate subsidiaries—of a competing unit in the industry. Its activities go so far as to resemble a deliberate attempt to take over the industry as a whole and make of it a federal function. It is this underlying element in the water power program that renders its constitutionality so doubtful. If the program were less ambitious, ways to sustain it would readily be found and approved.

With modification of the present program, the place of the federal government in the national power situation may well be made secure and salutary. The construction of huge projects on great rivers need not be left to private capital. But the time has not come for turning over the electric light and power industry, like the mails, to an executive department in Washington. So far as the present water power program directs itself toward such an end, it is fundamentally offensive to the Constitution. It is likely that no Supreme Court decision will sustain the full scope of activity of the Tennessee Valley Authority or similar federal corporate entities.<sup>104</sup>

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104. An excellent and thorough consideration of the subject of this article will be found in Note (1935) 48 HARV. L. REV. 806. See also Nicholson, *supra* note 78; Note (1934) 48 HARV. L. REV. 89.